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IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1986

WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLEE/RESPONDENT

VS.

GEORGE VITTECK, JR. AND JUDITH VITTECK, HIS WIFE, APPELLANTS/PETITIONERS

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTIONS PRESENTED FOR REVIEW

1. Are the Constitutional requirements of due process of law violated when a husband who possesses a property interest in a house through a tenancy by the entirety, is divested of those rights as a result of a mortgage foreclosure action, when he has not received individual, personal service, and there has been no valid substitute service in accordance with Pennsylvania Rules of Civil Procedure Numbers 1009 and 1145?

## PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF PENNSYLVANIA

A. GEORGE VITTECK, JR. AND JUDITH VITTECK, his wife, Appellants/Petitioners.

B. WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION, Appellee/Respondent.

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GEORGE VITTECK, JR. And

JUDITH VITTECK, his wife, Petitioners

VS.

WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION, RESPONDENT

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

---

Petitioners, above-named, respectfully pray that a writ of certiorari issue to review the final order of the Supreme Court of Pennsylvania entered in this case on January 21, 1986.

## OPINIONS BELOW

Appellant-Petitioner Vitteck filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on August 26, 1985, hoping that a careful analysis and review of these important issues involving substitute service upon a husband through his wife and other due process considerations would occur. The Petition for Allowance of Appeal was denied on January 21, 1986, by order without opinion. A copy of this per curiam final order is attached to the appendix at A-1 .

On July 12, 1984, following hearings held on June 18th and 27th, 1984, the Honorable Thomas D. Gladden, President Judge of the Washington County Court of Common Pleas entered a memorandum and order in this matter. (This memorandum is attached to this petition in the appendix at A-7 ). The lower court denied the efforts of George Vitteck, Jr. to open or strike off a mortgage foreclosure judgment and subsequent

sheriff's sale of his former home. In essence, the lower court found that proper service had been effectuated on George Vitteck, as the result of service upon his wife, Judith, away from the residence; that the sheriff's return was full and complete on its face; that Judith Vitteck was authorized to accept service on behalf of her husband; that considerations of due process had been satisified, and, by implication, that other record violations of the mortgage foreclosure acts were inconsequential.

The lower court's decision was appealed to the Pennsylvania Superior Court. A panel of the Court (consisting of Judges Cercone, McEwen and Handler) affirmed the lower court, pursuant to a per curiam order and memorandum filed on July 26, 1985. (This memorandum is attached to this petition in the appendix at A-3 ). The panel essentially found that Judge Gladden's holdings were correct, without substantial elaboration.

## JURISDICTION

The final order of the Supreme Court of Pennsylvania, in the Appendix at A-1, was entered on January 21, 1986. This Court's juridsiction is invoked under 28 U.S.C.§ 1257(3).

## CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

### UNITED STATES CONSTITUTION, AMENDMENT XIV.

--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS;EQUAL PRCTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICES: OFFICES; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of live, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### PENNSYLVANIA RULE OF CIVIL PROCEDURE NO. 1009. SERVICE

(b) When the defendant is an individual, the writ of summons, or the complaint if the action is commenced by complaint, may be served

(1) by handing a copy to the defendant; or (2) by handing a copy

(i) at the residence of the defendant to an adult member of the family with which he resides; but if no adult member of the family is found, then to an adult person in charge of such residence;

(ii) at the residence of the defendant to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which he resides; or

(iii) at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof,

PENNSYLVANIA RULE OF CIVIL PROCEDURE NO. 1145. SERVICE.

(a) The complaint shall be served by the sheriff upon the defendants. We shall also serve any person not named as a party who is found in possession of the land and shall so state in his return but such person shall not thereby become a party to the action.

(c) If service cannot be made under Subdivision (a) or (b) of this rule and the plaintiff sets forth in his complaint or files an affidavit that a defendant is deceased or his whereabouts unknown, or that he resides outside the Commonwealth, the Sheriff shall forthwith (1) make service on that defendant by posting a copy of the complaint on the most public part of the land and (2) send him, if not known to be deceased, a copy of the complaint by registered mail to his last known address.

## Statement of the Case

This is a petition to strike and a petition to open a default mortgage foreclosure judgment. The petitions were denied and dismissed by the Honorable Thomas Gladden of the Washington County Court of Common Pleas. The petitions were predicated upon defective service, lack of notice and noncompliance with the mortgage foreclosure act. A panel of the Pennsylvania Superior Court affirmed the lower court's dismissal, adopting the lower court's rationale. The Pennsylvania Supreme Court then denied a Petition for Allowance of Review.

The prior court determinations in this matter have been outlined in the preceeding Report of Opinions Below (pp. 2 and 3, infra). This summary also contained the names of the judges whose opinions are to be reviewed.

The facts of the case follow:

George Vitteck, Jr. bought and used as

his home, property known as 161 Caldwell Avenue, in 1973, financing the mortgage with First Federal (later known as Washington Federal Savings and Loan Association). There are two houses on the property and the Vittecks rented the backhouse. The mortgage terms with First Federal (later changed their name to Washington Federal) were: $13,600.00 principal, 7½% fixed interest rate, $109.57 monthly mortgage payment; with escrow for taxes and insurance the monthly payment was $148.00. (RR 8a-12a). The Vittecks, with their inheritance from George Vitteck's father's estate in January 1983, bought and moved into property known as 962 Buena Vista, Washington, Pennsylvania. The Vittecks rented out both houses on 161 Caldwell with the rent being far in excess of the $148.00 mortgage payment. The fair market value on the 161 Caldwell Avenue property as stated by Washington Federal was $34,500.00 ,

The payoff of the mortgage is approximately $9,000.00. (RR 40a).[1] George Vitteck has worked continuously over the past decade, at times working seven days a week, in addition to his community involvement in local politics as a Democratic Committeeman, and a commitment to the reserves of the armed forces. His financial situation was sound, having savings to cover his bills and for that matter all of the amount Washington Federal claims George Vitteck is in arrears. He worked continuously, made over $20,000.00 a year and several thousands of dollars in savings.(RR 83a-85a, 90a).

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Footnote: [1] R.R. references refer to pages in the Reproduced Record, which was submitted to the State Appellate Courts. The Record has not been reproduced here, as part of the petition for certiorari, but can be made available, should this Court require the same.

Judith Vitteck, George's wife, is a housewife who receives the mail and had responsibility for paying the Vittecks' bills. On occasions, the $148.00 monthly mortgage payment was not paid at times by Judith Vitteck, unknown to George Vitteck. Upon discovery of initial arreages, George Vitteck changed the signature on their joint checking account to require joint signatures. (RR 80a, 83a, 106a). He reviewed the checking ledger as often as he could given his schedule, and quite naturally assumed checks written and signed by both parties would be sent. At no time did he authorize for his wife to sign his name for him. Again, Judith Vitteck apparently did not make all payments to the bank, although George Vitteck had signed appropriate checks. In December, 1983, George Vitteck first learned from Judith Vitteck that the property was foreclosed in early November of 1983 by Washington Federal. At that point George Vitteck realized that he

had serious marital, communications and medical problems with his wife. Since then, he and his wife have attended marital and psychiatric counseling. (RR 66a-68a).

George Vitteck objects to the loss of his home under these circumstances. No service was ever effectuated on George Vitteck. (RR. 13a). It is uncontested and a matter of record that George Vitteck, Jr. was never served with the complaint personally by the Sheriff nor was there service by the Sheriff upon an adult at George Vitteck's residence or place of business. Additionally, no effort was made by the bank to file an affidavit in support of substituted service. Instead, a copy of his complaint was given by the Sheriff to Judith Vitteck at the Sheriff's office on Main Street. The Sheriff's return, filed of record, states the following:

> I hereby certify and return that on Friday, the 19th day of August, 1983, at 10:00 a.m., I served the within complaint in action of mortgage foreclosure upon the within named defenddant George W. Vitteck, Jr. by hand-

ing to his wife, Judith, at Main St., Washington, Washington County, Pennsylvania, a true and attested copy of the within complaint et al and making known to her the contents thereof.

So answers,
Samuel Secret, Deputy Sheriff
James A. Fazzoni, Sheriff

There was no evidence that George Vitteck ever gave Judith Vitteck authority to accept service for him. More particularly, the record reveals absolutely no written authority.

At the hearing in this matter, Deputy Sheriff Secret had no independent recollection of the service and relied upon the information contained in the sheriff's return. (RR. 155a ). The lower court found no more than that at some unspecified time George Vitteck had some general conversation with the sheriff. (See Opinion, p 3, A.9 ).

Washington Federal claims this is valid service, although it fails to follow the express requirements of Pennsylvania Rules of

Civil Procedure 1009 or 1145. Also mortgage foreclosure requirements were not followed. The notice of intention to foreclose letter was not attached to the complaint. Washington Federal, contrary to internal procedures, failed to contact George Vitteck directly. Washington Federal has not only refused George Vitteck the opportunity to pay off any arrearages, which he has the financial ability to do, but, also, Washington Federal, by taking the 161 Caldwell Avenue property at the November 4, 1983, Sheriff's sale for cost, will not give George Vitteck his $24,000.00 equity in the property ($34,500 fair market value minus the $9,000.00 accelarated mortgage plus penalty). Washington Federal claims the repeated notices to Judith Vitteck is sufficient.

Upon learning of the instant First Federal foreclosure, George Vitteck, immediately contact bank representatives and counsel.

Inquiries were made to begin negotiations for amicable settlement.

When negotiations failed, George Vitteck filed the instant petition to strike and petition to open the default mortgage foreclosure judgment so he may be given the opportunity to correct any mortgage arrearages pursuant to his right to cure under mortgage foreclosure provisions after proper notice, 41 Pa. CSA §404.

The order here under review is the January 21, 1986 order of the Pennsylvania Supreme Court, denying a petition for allowance of appeal. This had the effect of affirming the July 26, 1985 order of a panel of the Superior Court, which affirmed the July 12, 1984 order of the Court of Common Pleas of Washington County, Pennsylvania.

The issues raised in this petition including the averments of the denial of due process have previously been raised in a petition

to strike and open judgment filed on May 22, 1984. (RR. 1a-5a). The issues, including the averments of the denial of due process, were addressed by the lower court in its opinion and order. (See Opinion, p3, A9 ). The Superior Court also implicitly addressed all issues, by their incorporation and refence to the lower court's memorandum. These same issues were presented to the State Supreme Court in a timely petition for allowance of appeal in accord with state rules of appellate procedure.

## REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari should be granted. Pursuant to United States Supreme Court Rule 17, numerous grounds exist indicating that this Court should take active jurisdiction over this appeal.

This case presents issues of far-ranging impact in at least two separate evolving areas of law. First, this case presents an opportunity for the Court to evaluate the effect and scope of recent decisions of this Court regarding the Constitutional due process requirements of notice and service on each individual joint owner of property subject to an adverse litigation process. Secondly, this case raises a question of the direct application of service rules and the circumstances under which the plain language of those rules may be avoided. In deciding this question the Court must examine the relationship between husband and wife. In particular, this Court should determine what assumptions the law may now make, concern-

ing the receipt of legal papers affecting important property rights by a husband, when papers are received by a non-cooperating wife, in today's social environment.

Of central concern in analyzing a claimed due process violation is whether the aggrieved party was afforded the legal process which was due. Conceptually the due process clause

> . . .expresses the requirement of fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamenttal fairness" consists of in a particular situation by first considering any relevant precedents and thereby assessing the several interests that appear at stake.

Lassiter v. Department of Social Services of Durham County, North Carolina, --U.S.--, 101 S. Ct. 2153, 2158 (1981). While the parameters of due process are incapable of bright-line definitional distinctions, the lynchpin for constitutional sufficiency is whether the notice given to a litigant, prior to any ultimate decision affecting that litigant's rights, is "reasonably calculated, under all the circumstances, to apprise interested par-

ties of the pendency of the action and afford them an opportunity to present their objections. . ." Texaco, Inc. v. Short,--U.S.--,--, 102 S. Ct. 781, 794 (1982) citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Moreover, the Due Process Clause of the Fourteenth Amendment

> . . .imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Additionally, an elemental and "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Parratt v. Taylor,--U.S.--,--, 101 S. Ct. 1908, 1915 (1981) quoting with approval from Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

In the instant case, it is clear that petitioner George Vitteck was denied fundamental fairness in the litigation which resulted in the loss of a house in which he had accumulated a large amount of equity and was only slightly in arrears. A default judgment was taken against Vitteck, effectively foreclosing on both his house and any opportunity to be heard at a meaningful time and a mean-

ingful manner. As a result his chance to cure the minor arreage was lost, allowing the savings bank to reap the substantial forfeiture of Vitteck's accumulated equity.

The record is clear as to how this forfeiture came about. As outlined in the sheriff's return, filed of record, the complaint in mortgage foreclosure was never served on George Vitteck. Instead, a second copy of the complaint was served upon his wife, Judy Vitteck. Both husband and wife were record title holders of the property, possessing the house and lot as tenants by the entirety. Crucially, the delivery of the complaint to Judy was made at or near the Sheriff's office, not at the Vittecks' residence as would be mandated by Pennsylvania Rule of Civil Procedure regarding substituted service. The uncontradicted record testimony indicates that Judith Vitteck was experiencing some form of psychiatric problems at the time, leading to marital strain and requiring counselling. The upshot was that husband George Vitteck

never received the complaint in mortgage foreclosure and hence fell victim to a default judgment without realizing that he was in danger of losing his painfully-acquired life-savings, represented by the years of accumulated equity in the house.

The root issue in determining whether George Vitteck was treated fairly by the state adjudicatory procedures when this house was taken from him concerns service and notice. As noted, an elementary and fundamental requirement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution is that a litigant involved in any proceeding which is to be accorded finality must receive notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane, supra; Mennonite Board Of Missions v. Adams, --U.S.--, 103 S. Ct. 2706 (1983); Greene v. Lindsay, 456 U.S. 444 (1982). It is respectfully submitted that this test outlines the core

consideration for this Court in ascertaining whether George Vitteck properly was accorded the minimal due process protections guaranteed by the U.S. Constitution. It is further submitted that service upon a spouse alone, at a location away from the joint residence, contrary to express state service rules, while the couple is experiencing marital stresses brought on by the served spouse's psychiatric difficulties, is not sufficient to meet this due process test.

Some of the factors to be evaluated in determining whether sufficient notice has been provided prior to a deprivation of property include (1) the interest at stake for the individual; (2) the risk of an erroneous deprivation of the interest through the procedures used; (3) the probable value of additional or different procedural safeguards; and (4) the interest of the government in using the current procedure, rather than the additional or different procedures. LeBeau v. Spirto, 703 F. 2d 639 (1st Cir., 1983). Landon v. Plasencia --U.S.--, 103 S. Ct. 321 (1982). The application of these considerations to the facts of this case weigh

heavily to a finding that Vitteck's due process rights were violated.

First, it is very clear that the interest at stake for the individual is very high. This is a mortgage foreclosure action. Like most individuals in this country, George Vitteck is not a rich man. Like most individuals in this country, his major investment is his house. Realistically, as a working man, virtually his only opportunity to accumulate some degree of financial security for himself and his family lies with the slow accumulation of equity over several years in a residence. Overall, there is probably no single property interest of greater importance to the average American than his home equity. It is far too important to be lightly cast aside on the unstable foundation of doubtful procedure. Second, it is obvious that there is a high degree of risk in an erroneous deprivation of this substantial property interest through the procedure here approved by the Courts of the Commonwealth of Pennsylvania. Here, George Vitteck never received the complaint. It was provided to

his wife, away from the residence. Due to her apparent psychiatric problems and the attendant marital stress, she never informed her husband of the peril. Nonetheless, the Pennsylvania Courts were willing to presume that George Vitteck's wife was acting as his agent for purposes of receiving the mortgage foreclosure complaint. Unfortunately, the hard truth is that this presumption cannot be maintained in today's social and marital climate. This is an extremely important reason why this Court should grant the writ of certiorari in this case. State courts across the country are in need of a strong statement from this highest legal authority to re-think their service rules in light of the dramatic changes in the relationship between husband and wife. The current social order, strongly influenced by mass higher education, the feminist movement, the economic realities of two-income households, and the unparalled rise in divorce rates does not easily afford the presumption that all communications delivered to one spouse can reason-

ably be assumed to reach the other spouse.

The social changes which have now taken hold in contemporary relations between husband and wife were foreseen by a Pennsylvania judge several years ago. In Tax Claim Bureau v. Whearcroft, 2 Cmlth. 408, 415, 278A, 2d 172, 176 (1971), Judge Manderino wrote in dissent:

> While it is true that tenancy by the entirety occupies a unique position in real estate law, present enlightened social and economic attitudes make it unrealistic for the courts to continue to follow Bracton's maxim: Man and wife are as one person, for they are one in flesh and blood. It is obvious that man and wife are not one person. They are two distinct beings, who, if they hold property as tenants by the entirety, are two distinct owners of an undivided whole property.

Manderino's position was later adopted as a mater of statutory interpretation in Pennsylvania tax sale law, requiring individual notice of tax sales to both husband and wife in Teslovich v. Johnson, 486 Pa. 622, 406A. 2d 1374 (1979).

It should also be noted that other state and federal courts have taken a position con-

trary to that adopted by the Pennsylvania courts in this case. In New York, it has been recognized that spouses are not legally partners, nor each other's agent for service of process. City of New York v. Chemical Bank, 470 N.Y. Supp. 2d 280 (N.Y. Sup. Ct., 1983). That court also recognized that spouses frequently occupy a position of conflict-of-interest regarding jointly-held property. One spouse may desire that a particular debt or lien be satisfied from the jointly-held property, rather than be applied to some other property held singly. When this is true, the chances that a default will occurr without the knowledge of the spouse disadvantaged, may rise substantially. Federal courts recognizing this position also include Zarcone v. Condie, 62 F. R.D. 563(SDNY,1974)and Woodring v. Jennings State Bank, 603 F. Supp. 1060 (D. Neb., 1985). Woodring went so far as to recognize a cause of action in favor of a spouse not properly served when jointly-held property was sold by a judgment creditor.

Overall, current social and marital realities make it extremely dangerous for the property rights of individual spouses to be extinguished as the result of service accomplished on one spouse alone. Viewed from the prospective of the potential amount of nationwide marital discord, allowing the service principles approved by the Pennsylvania state courts to stand, could lead to vast amounts of unjust forfeiture.

The third factor to be considered is the probable value of additional or different procedural safeguards. It should be apparent that a spouse who in fact receives personal service will be in position to protect his rights. Other means of service, as specifically authorized by Rules of Civil Procedure, such as delivery to an adult member of a household, <u>at the residence,</u> may also reasonably be expected to provide notice. If service is accomplished at the residence, either or both spouses may be home, a neighbor or other family member may notice the sheriff's presence or

the papers left in a position where they would be noticed by either spouse. It's much more difficult for one spouse to hide the fact of a service under these conditions and hence may represent a reasonable compromise among the competing interests between actual notice and a reasonable burden to obtain the service. As noted in the statement of the case, service here was made on the wife alone, at a location away from the residence.

The fourth factor is the interest of the government in maintaining the current procedures. There is no valid governmental interest in permitting litigation to be binding on one spouse, solely as the result of service upon the other spouse, in the absence of some written evidence of authority to accept service, some demonstration of evasion of service or some showing of impracticability to serve at the residence. There was no demonstration of any special service difficulties in this case and hence no justification for departing from the accepted service rules.

A note here should be made regarding the factual findings of the lower court. As outlined in the statement of the case, the record fails to evidence in any way that George Vitteck ever authorized his wife to accept service in his behalf. A study of an alleged conversation between George and the sheriff does not reveal any intention to permit such service, nor a full understanding of the specific legal rights at issue. As noted from the fact of the sheriff's return, only wife Judy was served, with no indication of authority from George for her to accept service on his behalf.

The method of service approved here cannot pass constitutional muster. In other cases, this Court has found that notice by posting and publication of a tax sale was insufficient in the absence of a showing that mailing was not practicable. Mennonite Board of Missions, supra. Posting the notice on property involved in an ejectment action was also found inadequate. Greene, supra.

An additional ground for finding that George Vitteck's due process rights were violated here exists by virtue of the fact that the state courts approved a service procedure directly contrary to express service rules. Service is void on constitutional grounds for failure to follow the state-approved methods of service. Wuchter v. Pizzutt, 276 U.S. 13, 48 S. Ct. 259, 72L.Ed. 446 (1924); accord, Leab v. Streit, 584 F. Supp. 748 (S.D. N.Y., 1984).

In the instant case there is a defect of service which voids the default judgment. The rule for service of a complaint in Pennsylvania is Pa. R.C.P. 1009 which states:

> (b) When the defendant is an individual, the writ of summons, or the complaint if the action is commenced by complaint, may be served
> (1) by handing a copy to the defendant; or
> (2) by handing a copy
> (i) at the residence of the defendant to an adult member of the family with which he resides; but if no adult member of the family is found, then to an adult person in charge of such residence; or (ii) at the residence of the defendant to the clerk or manager of the hotel, inn, apartment house, boarding house or other

> place of lodging at which he resides; or (iii) at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof. (Emphasis added).

It is uncontested and a matter of record that a complaint for George Vitteck, Jr. was given to Judith Vitteck on August 19, 1984, while she was outside the courthouse on Main Street. (R.R. 13a). It is also uncontested and a matter of record that the time of attempt of service on George Vitteck, Jr., that he was living at 962 Buena Vista Street, having moved from 161 Caldwell Avenue in January of 1983. (R.R. 65a, 69a, 129a).

It is obvious that the service requirement was not met. There was no service on George Vitteck, Jr. personally to meet Pa. R.C.P. 1009 (b) (1). There was no service on an adult member, either of family or in charge, at the residence of George Vitteck, Jr. to meet Pa. R.C. P. 1009 (b) (2).

These service rules which outline the

official policy balances regarding service issues, should not be discarded lightly. Other states have also recognized the importance of obtaining substitute service on individuals other than the defendant at specifically named locations likely to enhance the probability that actual notice will occur. For example, Arizona courts have stated that the 14th Amendment requires that substituted service must occur at the place where the defendant normally actually resides so that service will be substantially likely to bring home notice to the defendant. Bowen v. Graham, 684 P. 2d 165 (Ariz. App., 1984), referring to 4 C. Wright and A. Miller, Federal Practice and Procedure, § 1096 (1969); accord, in the context of a business location, Akron-Canton Regional Airport Authority v. Swinehart, 406 N.E. 2d 811 (Ohio, 1980). It is evident that the nexus between substituted service and a location likely to result in actual notice rises

to a constitutional level.

It should also be noted that these facts demonstrate a lack of compliance with Pa. R.C. P. No. 1145, the rule for service directly concerned with mortgage foreclosure actions. Pa. R.C.P. No. 1145(a) specifically requires that "The complaint shall be served by the sheriff upon the defendants". (Emphasis added). Pa. R.C.P. No. 1145 (c) provides for substituted service under certain conditions. Service by posting or publication is permitted if, and only if, the complaint or affidavit avers that a defendant is deceased, whereabouts unknown, or is outside the Commonwealth. On this record, no such allegation was made. Accordingly, the lender had no option other than to obtain personal service on the defendant, absent the necessary allegations for substituted service.

None of the Pennsylvania State Court opinions in this case demonstrate how the sheriff's return fell within the language of

the Pennsylvania service rules. Rather, the lower courts sought to justify the service in this case, by going beyond the return to hold that Judy Vitteck had accepted service, on behalf of her husband, George. (See Common Pleas opinion, p. 3; Superior Court opinion, p. 1). However, no where on the record was there any evidence, from any source, that specifically demonstrated that George Vitteck had granted his wife the authority to accept service for him. Emphatically, the record does not contain testimony to indicate authorization from George Vitteck for such acceptance. Additionally, this holding is inconsistent with another panel of the Superior Court. In Main Line Abstract Company v. Penn Title Insurance Company, 423 A.2d 379 (Pa. Super., 1980), it was specifically held that acceptance of service needed to be in writing and on record by one authorized to accept service for the defendant. The acceptance of service also needed to be noted on the sheriff's return of service. Where the record did not re-

flect this written authorization and acceptance, it was necessary to strike the judgment because a fatal defect appeared. See also Pa. R.C.P. 1011 and 1013.

It should be clear from this record that Washington Federal cannot rely on agency theories. There was no authority given by George Vitteck to his wife to accept service or run their financial affairs carte blanche. In fact, just the opposite situation exists. George Vitteck expressly changed the checking accounts requiring both signatures. (R.R. 80a, 83a,106a). The bizarre financial management of Judith Vitteck, of not sending checks that were signed, not paying bills when there was sufficient funding, signing George Vitteck's name without his approval, works no benefit to George Vitteck. The 161 Caldwell property was a goldmine; it had high equity, nominal monthly mortgage payments well below rental payments, and a 7½% mortgage. No one would knowingly lose the $24,000.00 in equity on the property for Sheriff's costs. The actions of Judith Vitteck were fraudulent and very

much antagonistic to George Vitteck negating any imputation of agency.

The record in this case clearly demonstrates that George Vitteck's due process rights were violated. The violations were compounded further by the state's sanctioning of deviations from the express service rules.

Overall, there are special and important reasons to grant a writ of certiorari in this case. It is clear that the state courts have resolved a federal question, involving the federal constitutional protections of due process of law in a way in conflict with the applicable decisions of this Court. Further, the emerging issue of the requirements of service among and between spousal joint owners, raises an important question of federal law which has not been, but should be settled by this Court. The monetary amounts in this case represent large amounts to the individual petitioners, seeking to save their house

equity. The effects of a decision by this Court on these issues will have great impact, far beyond the instant parties. In this time of growing domestic and spousal social change, the rights and constitutional protections of the <u>individual</u> spouse must be clearly outlined. There is hardly a household in America which will not be touched in a favorable way by such a decision. This court should also note the extreme difficulty that middle-class families experience in bringing legal issues of importance to them through the higher courts . Legal assistance programs are not available to finance middle-class litigation. Families forced to endure the humiliation of a mortgage foreclosure rarely have the funds to pursue litigation to this Court. Now that these important questions have now been presented at this level, this Court is urged strongly not to overlook the opportunity to set the record straight on this matter of far-reaching significance.

## Conclusion

These important issues should be addressed by this Court. The law requires clarification concerning the direct application of service rules in the context of spousal relations, as well as the extent to which due process considerations require individual service on each individual property owner involved in litigation. For the reasons previously outlined, a writ of certiorari should issue to the Supreme Court of Pennsylvania so that this Honorable Court may review and correct the decisions below.

Respectfully submitted,

Peter M. Suwak

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Pa. I.D. No. 23779

Admitted to U.S. Supreme Court Bar

# APPENDIX

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

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No. 552 W.D. Allocatur Docket 1985

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FINAL ORDER

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Dear Mr. Suwak:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above matter:

"Denied
1-21-86
Per Curiam"

By THE COURT:

Irma T. Gardner
Deputy Prothonotary

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| WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION<br>Appellee | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| GEORGE VITTECK, JR., and JUDITH VITTECK, HIS WIFE | : | |
| APPEAL OF: GEORGE VITTECK, JR. | : | No. 00992 Pittsburgh 1984 |

Appeal from the Order July 12, 1984 in the Court of Common Pleas of Washington County, Civil, No. 218 August Term 1983, 12 Sept. Term, 1983

BEFORE: CERCONE, McEWEN AND HANDLER*, JJ.

PER CURIAM: FILED: JULY 26, 1985

The order of the learned Washington County Common Pleas Court President Judge Thomas D. Gladden is affirmed.

*Judge Earl R. Handler, of the Court of Common Pleas of Indiana County, Pennsylvania, is sitting by designation of the Pennsylvania Supreme Court.

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| WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION<br>Appellee | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| GEORGE VITTECK, JR., and JUDITH VITTECK, HIS WIFE | : | |
| APPEAL OF: GEORGE VITTECK, JR. | : | No. 00992 Pittsburgh 1984 |

Appeal from the Order July 12, 1984 in the Court of Common Pleas of Washington County, Civil, No. 218 August Term 1983, 12 Sept. Term, 1983

BEFORE: CERCONE, McEWEN AND HANDLER*, JJ.

MEMORANDUM:

Appellant, George Vitteck, Jr., has undertaken this appeal from an order which dismissed his petition to open and/or strike a default judgment entered in a mortgage foreclosure action. Appellant contends that the court erred in refusing to open or strike the judgment based upon his allegations of defective service, lack of notice and non-compliance with statutory provisions govern-

ing actions in mortgage foreclosure. We affirm.

Appellant's initial argument is that the court was without jurisdiction to enter judgment against him due to service having been accomplished by the sheriff handing a copy of the complaint to the wife of appellant on a street outside of the courthouse rather than at the home of the parties.[1]

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[1] Service in this manner was accomplished at the request of the Vittecks. As noted by the trial court, the property was also posted in accordance with the applicable statute and notice of the sale advertised.

*Judge Earl R. Handler, of the Court of Common Pleas of Indiana County, Pennsylvania, is sitting by designation of the Pennsylvania Supreme Court.

It is true, as appellant argues, that if service of the complaint was defective, the court did not have jurisdiction and the judgment is subject to a motion to strike. See Continental Bank v. Rapp, ___ Pa. Super. ___, 485 A.2d 480 (1984). However, each of the arguments concerning the validity of the service of the complaint has been discussed and properly rejected in the opinion of the distinguished President Judge Thomas D. Gladden and further discussion by this Court would be purposeless.

Similarly, we find the arguments in support of the petition to open to be without merit. "Ordinarily, three factors must be present for a court to open a default judgment: (1) the petition to open must be timely filed; (2) the failure to file a timely answer must be excused; and (3) the party seeking to open must have a meritorious defense." Continental Bank v. Rapp, supra at ___, 485 A.2d at 485; Maiorana v. Farm-

mers & Merchants Bank, 319 Pa. Super. 338, ____, 466 A. 2d 188, 191 (1983). Appellant argues that the court erred in dismissing the petition to open as a result of certain findings of fact which appellant contends are not supported by competent evidence. We have reviewed the record before us and have determined that the findings of fact made by the court, contrary to the assertions of appellant, are supported by the evidence. The court, based upon the evidence before it, properly dismissed the petition to open. We, therefore, affirm the order of the court which dismissed the petition to open and/or strike the default judgment.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

CIVIL DIVISION

| | | |
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| WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, Respondent | ) | |
| vs. | ) | No. 218 August Term, 1983 A.D. |
| GEORGE VITTECK, JR. and JUDITH VITTECK, his wife, Defendants, Petitioners | ) | No. 12 September Term, 1983 A.D. |

BEFORE: Gladden, P.J.
June 18, 1984; June 27, 1984

APPEARANCES: David S. Posner, Esq., representing Plaintiff,
Michael L. Fitzpatrick, Esq., representing Defendants

MEMORANDUM & ORDER

This matter is before us on defendants' Motion to Strike Judgment and Motion to Open Judgment. These motions arise out of a mortgage foreclosure instituted by plaintiff against property of defendants located at 161 Caldwell Avenue, Canton Township, this

county. The property was sold at Sheriff's Sale in November, 1983, because the mortgage payments due plaintiff were in arrears. This was not the first time that plaintiff had taken steps to foreclosure on this property.

Defendants advance various reasons for asking the court to set aside the sale of their property. They claim that there was not proper service on George Vitteck, husband defendant; that Judith Vitteck, wife defendant, was not the agent of her husband; and, that defendants' due process rights were violated.

We find no legal merit in these arguments and dismiss defendants' motions.

Evidence reveals that the Sheriff served Judith Vitteck in his office at defendants' request. Evidence further shows that the property was posted in accordance with the law, and notice of sale was advertised as mandated. Although defendants did not live in the property, they lived within three blocks of it, and while the property

was posted George Vitteck was waging a vigorous election campaign in the neighborhood. To believe that he did not see the posting on his property defies common sense. In any event, the Sheriff's return is full and complete on its face and is, therefore, conclusive and immune from attack by extrinsic evidence. Hollinger vs. Hollinger, 416 Pa. 473, 206 A.2d 1 (1965). There is no fraud alleged or proven against the Sheriff.

Further, we find that service on Judith Vitteck was service on George Vitteck. After attempts to serve the defendants at their home proved unsuccessful, the defendants called the Sheriff's office and made arrangements to pick up the papers there. The Sheriff testified that he spoke with both defendants. When Judith Vitteck appeared in the office by herself she was served for both. This was proper service under the Pennsylvania Rules of Civil Procedure.

Finally, we find no violation of due process. The plaintiff complied with all

statutory obligations regarding statutory notice. Even though the mailed notices were sent to the Caldwell Avenue address, the defendants were living only three blocks away, and there is no evidence that any mailings addressed to defendants were returned to plaintiff. Additionally, no proof was offered to show that defendants had given notice of a change of address to plaintiff. Plaintiff had been in contact with Judith Vitteck about the arrearages on several occasions. This mortgage had been a continuous problem for plaintiff, and plaintiff was not bending over backward to be lenient with defendants.

While there are innuendos from George Vitteck's testimony that Judith was having some psychiatric problem which led to this financial debacle, there is no proof of any such condition. The evidence appears to contradict these suggestions. All the while George allowed Judith to continue to manage their financial affairs. After the earlier threatened foreclosure, even though he changed their checking account to require

joint signatures, he did nothing in the way of overseeing their accounts or her performance as bookkeeper. When pressed as to why these payments were not made, Judith said it was because there was not sufficient money in the account. If it was his object to monitor his wife's bookkeeping and avert financial problems, George Vitteck failed. It is possible that such watchfulness was never contemplated.

Having found proper service and no meritorious defense, we enter the following

ORDER

AND NOW, this 12th day of July, 1984, Defendants' Motion to Strike Judgment and Motion to Open Judgment are denied and dismissed.

BY THE COURT:

/s/

THOMAS D. GLADDEN, P.J.